Commission's traditional policy in which it had "consistently sought to avoid this type of [quantitative] regulatory approach."[89]

The proposal to impose minimum public interest obligations on broadcasters is nothing more than an effort to reimpose the type of quantitative programming requirement eliminated by the Commission, and is no more justified than it was sixteen years ago. Just as the Commission then found market forces were ensuring the provision of programming in the public interest, so now broadcasters are still demonstrating a strong record of community service. Based on the NAB study, it appears that the average broadcaster donates $1 million in public service annually. The study also documents the significant resources broadcasters devote annually to public affairs and political coverage, over and above the extensive news coverage that the vast majority of broadcasters provide.[90] The NAB study also documents that stations are deeply involved in their communities, responding aggressively to the problems and concerns revealed by their numerous campaigns to raise funds for charitable causes, provide relief to victims of natural and other disasters, and supply crucial information to help people avoid danger and find assistance in dealing with social and medical problems. In short, regulations are not needed to get broadcasters to air programming responsive to the needs and concerns of their communities.

Moreover, the same disadvantages inherent in quantitative programming requirements identified by the Commission sixteen years ago still militate against their adoption. There would

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89 *See* id. at ¶¶8, 25-29.

90 For example, the study found that broadcasters provided a projected $148.4 million in free air time to candidates in 1996. Nearly 60 percent of broadcasters. including 44 percent of television stations, aired a local public affairs program or segment (excluding news broadcasts) dealing with the 1996 elections. Sixty-three percent of television stations ran special segments profiling candidates and/or their stands on issues.

be significant administrative costs associated with the record keeping necessary to prove compliance with quantitative programming obligations. Requiring broadcasters to present specified minimums of programming falling into categories defined by the Commission unquestionably intrudes into broadcasters' editorial discretion, an infringement made all the more unpalatable given the Commission's acknowledgement that "many television broadcasters have demonstrated a strong record of community service."[91] Finally, as shown by the discussion in Section III, the imposition of affirmative programming requirements is of doubtful constitutionality.

The Commission also seeks comment on the proposal of People for Better TV that digital broadcasters should "'disclose their public interest programming and activities on a quarterly basis, matched against ascertained community needs,' gathered by reaching out to 'ordinary citizens and local leaders' and sought through 'postal and electronic mail services as well as broadcast announcements.'"[92] The proposals for formal ascertainment and "enhanced" disclosure requirements, like the call for programming minimums, are attempts to resurrect needless and burdensome regulation.

In 1984, the Commission eliminated formal ascertainment, finding that:

> Commercial necessity dictates that the broadcaster must remain aware of the issues of the community or run the risk of losing its audience. In short, present market forces provide adequate incentives for licensees to remain familiar with their communities. Moreover, future market forces, resulting from increased competition, will continue to require licensees to be aware of the needs of their communities. Given this commercial reality, we believe that the need for our

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91 *NOI* at ¶21.

92 *NOI* at ¶15, *quoting* Letter from People for Better TV to William E. Kennard, Chairman, FCC, Nov. 16, 1999.

> ascertainment regulation has declined and will continue to decline, and that the Commission should eliminate it.[93]

The Commission also found that program logging requirements "constituted the largest government burden" in terms of total hours expended.[94] The Commission eliminated the logging requirements, promulgating instead what the Commission considered "the best method of documentation suitable and adequate to our new regulatory scheme for television broadcasting ... a quarterly issues/programs list requirement"[95] that is still in place.

The Commission's reasons for eliminating formal ascertainment requirements and streamlining the reporting requirements on programming remain sound, and the regulatory scheme created in their place has worked well. As the Commission has stated:

> Ascertainment procedures were never intended to be an end in and of themselves. Rather, these procedures were intended as a means of ensuring that licensees actively discovered the problems, needs, and issues facing their communities, thereby positively influencing the programming performance of stations by affecting the process of program decision-making.[96]

The evidence clearly demonstrates that broadcasters are well integrated into their communities, and engage in continuing dialogue with diverse groups in their coverage areas, without the need for formalized and quantified requirements to meet with "ordinary citizens and local leaders." Perhaps lost in the clamor of some for bureaucratic ascertainment standards is the fact that any broadcast station with a news department is "ascertaining" community issues on a daily basis. Though their news personnel, the vast majority of broadcasters are constantly

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93 *Deregulation of Television*, 98 FCC 2d at 1098-99, ¶49.

94 Id. at 1106, ¶69.

95 Id. at 1107, ¶71.

96 Id. at 1098,¶48.

interviewing and otherwise obtaining the views of political and community leaders, those working for political and social change, and various individuals affected by the poor functioning of community services or by the misdeeds of those whose actions should come under official scrutiny. Station contacts with the community are not limited to station news personnel. General managers, public affairs personnel and others, including sales personnel, are constantly in dialogue with various components of the community. As the Commission recognized in 1984, these contacts are essential to any broadcaster's ability to stay competitive, because a station that falls out of touch with the concerns of and issues facing its community will fail in the marketplace.

Through their quarterly issues/program lists, broadcasters report on the specifics of how they have responded to ascertained community issues. In fact, the bulk of the "enhanced disclosures" referred to in the Notice are already addressed in these quarterly reports or in the quarterly children's reports.[97] The chief attribute of proposals for "enhanced" disclosure is the addition of bureaucracy and administrative cost associated with having to formalize and quantify the manner in which the information is presented. The advent of digital television provides no reason to return to what are in effect "logging requirements," recognized by the Commission in 1984 to be a costly regulatory burden.

C. Broadcasters Are Enhancing Access to the Media on a Voluntary Basis, and No Additional Regulation Is Needed.

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[97] Thus a station's public affairs programming, local programming, programming that meets the needs of underserved communities, and children's programming will in the ordinary course be included in these reports.

In the Notice, the Commission emphasizes the importance of enhancing the access to the media of people with disabilities and of fostering diversity within broadcasting.[98] The record demonstrates that broadcasters as a whole and CBS in particular share these goals. CBS believes that under present regulatory structure, broadcasters on a voluntary basis can and should continue to enhance media access to all people.

1. Further Expansion of Access to Those with Disabilities Should be on a Voluntary Basis

For many years, CBS has worked to expand access to its programming to people with disabilities. Well before passage of the 1996 Telecommunications Act and the promulgation of the Commission's regulations relating to video programming accessibility, CBS, on a voluntary basis, was closed captioning virtually all of its network programming.[99] The Commission has now adopted rules which, by the year 2006, will require closed captioning of 100 percent of new programming, except for programming fitting narrowly circumscribed exemptions.[100] Broadcasters are providing closed captioning now, pursuant to the transitional benchmarks established by the Commission. CBS stations are well ahead of those benchmarks, and will be in full compliance with the requirement of virtually complete captioning of new programming when that obligation becomes effective.

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98 *NOI* at Section II C, ¶¶23-33.

99 *See* Comments of CBS filed March 15, 1996 in MM Docket No. 95-176.

100 *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, MM Docket No. 95-176, *Report and Order*, 13 FCC Rcd 3272 (1997) ("*Video Programming Accessibility*"), *recon. granted in part and denied in part*, 13 FCC Rcd 19973 (1998).

In the course of formulating and reconsidering its captioning regulations, the Commission did establish and then retain certain narrow exemptions. Now, in the context of the transition to digital broadcasting, People for Better TV seek to revisit and eliminate those exemptions. Nothing in the transition to digital broadcasting justifies disturbing the Commission's reasoned judgment in this regard.

The Commission seeks comment on proposals to require captioning of PSAs, public affairs programming and political programming. In 1997, the Commission exempted PSAs because of their large number, because they may be completed only shortly before air, and since much of the information involved is displayed in visual form. Moreover, the Commission recognized that PSAs are "essentially without an independent source of financial support [and are] frequently created with donated production resources."[101] As the Commission then explained, the "additional cost of captioning could interfere with the PSA creation and distribution process."[102] In short, the Commission believed requiring captioning could create economic and practical burdens that would result in broadcasters providing less of this public service than they otherwise could. This analysis remains valid, and is not altered by the transition to digital broadcasting. Of course, nothing prevents broadcasters from voluntarily captioning PSAs where it is economically feasible to do so. Where public service organizations choose to caption their PSAs, broadcasters are obliged to pass those captions through to their viewers, unless reformatting is necessary. Similar analysis applies to local public affairs and

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101 *Video Programming Accessibility*, 13 FCC Rcd at 3345, ¶151

102 Ibid.

political programming. In 1997, the Commission created a very limited exemption for locally produced and distributed non-news programming with limited repeat value.[103] The Commission noted that "[m]uch of this programming is produced on a very low budget basis, is not remunerative in itself, is presented essentially as a 'public service,' and has only a one time appeal to a local audience. Thus, a captioning requirement could result in a sufficient economic burden that such programs are not televised at all."[104] On reconsideration, the Commission left the exemption intact, emphasizing that it exists only for programming that has no repeat value.

To the limited extent this rule exempts some public affairs or political programming, it is clearly justified, since the alternative could mean the elimination of the programming as a matter of economic necessity. The maintenance of this exemption does not mean that public affairs and political programming will not be captioned. Some of it clearly does not fit the narrow exemption. More importantly, CBS agrees that, where feasible, broadcasters should voluntarily caption such programming.

CBS also supports the voluntary development of technologies that can make television more accessible to individuals with visual impairments. Video description, on a technical level, will be more feasible in a digital environment than it is now. Nevertheless, significant issues of statutory and constitutional authority, copyright law, and practical problems, such as video description's effect on the program production process, remain to be addressed.[105] Indeed,

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103 Id. at 3347-48, ¶158

104 Ibid.

105 *See* Comments of the National Association of Broadcasters, MM Docket No. 99-339, dated February 23, 2000.

questions have been raised by some within the visually-impaired community as to the value of video description.[106] Resolution of all these issues is necessary before the Commission considers imposition of video description requirements.

2. CBS and Other Broadcasters Are Committed to Fostering Diversity in the Broadcast Industry

CBS is in the forefront of a broad coalition of broadcasters that is firmly committed to fostering diversity in the broadcast industry through a variety of means. To begin with, broadcasters are committed to equal opportunity in their hiring and promotion practices. Soon after the United States Court of Appeals struck down as unconstitutional the Commission's EEO recruitment rules,[107] 17 major broadcasting companies, including CBS, publicly announced their intention to abide by equal employment opportunity principles.[108]

But the industry's diversity commitment is not limited to employment practices. As described above, CBS has been instrumental in creating and funding the Prism Fund, through which a consortium of broadcasters intends to make as much as $1 billion available to minorities and women for the purchase of stations. CBS is also contributing to the National Association of

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106 *See, e.g.,* Programmers Say FCC Should Move Slowly on Video Description, Warren's Cable Regulation Monitor, March 6, 2000:

> Even National Federal of the Blind, in comments filed with Commission, said FCC shouldn't mandate video description (MM 99-339). Group said it supported voluntary development of description services, saying visually impaired are "ambivalent" about description services because they often are "irritating, overdone and full of irrelevant information" and because they would prefer improvements in the delivery of current information that's carried in text messages on screen....

107 *Lutheran Church-Missouri Synod v. FCC*, 141 F. 3d 344 (D.C. Cir. 1998).

108 *See, e.g.,* Chris McConnell, *Seventeen Firms Make Pledge to EEO Principles*, Broadcasting and Cable, August 3, 1998, at 16.

Broadcasters Educational Foundation's creation of two funds intended to provide training to members of underrepresented groups, in order to enhance their ability to acquire and successfully operate broadcast stations.

In the past few months, CBS and the other major broadcast networks have each entered agreements with the National Association for the Advancement of Colored People and other minority organizations intended to increase diversity. Among other things, CBS's agreement with a coalition of organizations[109] calls for:

- The appointment of a new senior-level Vice President, Diversity, who will coordinate and implement CBS's diversity initiatives – including enhanced outreach and recruitment, hiring, promotion, mentoring, and representation in management and non-management positions
- Significantly increasing the number of minority writers, directors and producers in all programming production
- Establishing new ties with the minority-owned advertising community, and increasing the use of minority-owned media to promote CBS's entire line-up
- Seeking out minority-owned firms for professional services of all kinds
- Continuing to work to build minority ownership in the media business
- Implementing a Network initiative to increase minority hiring by providing incentives to managers for their accomplishments in diversity hiring

This overall record reflects that CBS and other broadcasters are committed to expanding diversity representation in every facet of the industry. CBS endorses recommendations of the *Advisory Committee Report* that could enhance diversity in the digital world. By refraining from

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[109] The organizations are the National Association for the Advancement of Colored People, the National Latino Media Council, the Asian Pacific American Media Coalition and American Indians in Film and Television.

imposing burdensome taxes or other obligations on broadcasters who multiplex, the Commission will aid in the development of innovative new program services that could involve minorities in a variety of ways. CBS also agrees that returned analog spectrum channels can and should be used for a variety of noncommercial purposes, including programming directed to minority groups.

D. Government Requirements That Broadcasters Supply Quantified Amounts of Free Air Time to Candidates Violate Broadcasters' First and Fifth Amendment Rights

Without proposing any rules or policies in the Notice, the Commission seeks comment on proposals to improve "the quality of political discourse" and, specifically, on the Commission's authority to require broadcasters to provide free air time to political candidates.[110] At the outset, CBS notes the proposal of the *Advisory Committee Report* that "[i]f Congress passes comprehensive campaign finance reform, broadcasters [should] commit firmly and clearly to do their part to reform the role of television in campaigns."[111] CBS agrees with the *Report's* acknowledgement that it "is not reasonable to expect broadcasters alone to provide all the answers [to perceived flaws in the campaign system], or to make as the central component of reform Federal mandates upon broadcasters."[112] As discussed below, CBS believes that mandates requiring broadcasters to provide quantified free time to candidates violate broadcasters' First Amendment rights and, by singling out broadcasters to bear the cost of a

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110 *NOI* at ¶¶34, 38.

111 *Advisory Committee Report* at 57.

112 Id.

reform purportedly for the benefit of society as a whole, represent an unconstitutional taking in violation of the Fifth Amendment. Nonetheless, in the context of the enactment of comprehensive campaign finance reform, CBS is committed to contribute on a voluntary basis to a broad-based effort to enhance opportunities for political candidates to present their views to the public.

CBS has voluntarily provided opportunities in the past for candidates to present their views in their own words to the public. In 1996, for example, CBS provided the presidential candidates with the opportunity to present two to two-and-a-half minute, unedited and unfiltered statements on each of four separate issues determined by CBS News polling to be of greatest concern to the American public. These statements were broadcast back-to-back on the CBS EVENING NEWS WITH DAN RATHER over four consecutive days two weeks before the 1996 election. The messages were repeated on the CBS Network program THIS MORNING and on the Network's overnight news program UP TO THE MINUTE. The statements were broadcast by the then fourteen CBS owned stations in their late local news broadcasts during the final two weeks of the campaign. CBS also made the statements available to its affiliates across the country for their use.

In addition to their broadcast on network and local television, the statements were broadcast on CBS news and information radio stations five times per day, rotated through every day part, including morning and afternoon drive time, for the final two weeks of the campaign. On the weekend before the election, all four statements of each candidate were rebroadcast on these radio stations. During the two weeks before the election, the CBS music stations broadcast at least three announcements per day informing listeners of the broadcast of the statements on

local CBS television news programs and on the news radio stations. The statements also were made available to stations affiliated with the CBS Radio Network.

As noted in the *NOI*, other networks also voluntarily provided significant free air time to the major presidential candidates to present their views during the 1996 election.[113] We believe the broadcast industry as a whole shares our commitment to enhancing opportunities for political candidates to present their views to the public, and is prepared to make voluntary efforts in this direction in the context of comprehensive campaign finance reform.

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[113] *NOI* at ¶35.

1. Proposals for Mandating Free Time for Political Candidates, Whether Analyzed Under the Spectrum Scarcity Doctrine or Traditional First Amendment Principles, Are Constitutionally Suspect Incursions into the Editorial Discretion of Broadcasters and Are Not Justifiable as Part of Broadcasters' General Public Interest Obligations, Much Less as a Price to be Extracted in the Transition to Digital Broadcasting

The Notice seeks comment on several proposals to require broadcasters to provide specified quantities of free time to political candidates during specified periods in advance of elections. There can be no doubt that, but for the doctrine of spectrum scarcity, these proposals would be patently unconstitutional. Under traditional First Amendment principles, the government has no authority to compel a media entity to carry the political speech of others, in substitution for its own editorial control and judgment.[114] The proposals are akin to a governmental dictate that a newspaper carry on its front page articles written by political candidates, the size, frequency, and format of which are determined by the government.

The argument has been made, of course, that the decision in *Red Lion* provides support for this deep incursion into broadcasters' editorial discretion. As discussed in detail in Section III, the factual and policy bases for *Red Lion* have become untenable. But even assuming the

[114] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Forcing the press to carry the political views of others is a particularly pernicious violation of the general constitutional principle that citizens and private organizations and corporations may not be coerced to carry or associate with political speech with which they may disagree. *See Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995); *Pacific Gas and Electric Co. v. Public Utility Commission*, 475 U.S. 1 (1986); and *Wooley v. Maynard*, 430 U.S. 705 (1977).

continuing validity of the spectrum scarcity doctrine, we submit that mandated free time for candidates cannot pass the applicable constitutional tests.

There can be no doubt that broadcasters enjoy broad First Amendment rights. *Red Lion* and the line of cases applying its scarcity doctrine have "made clear that broadcasters are engaged in a vital and independent form of communicative activity. As a result, the First Amendment must inform and give shape to the manner" in which they are regulated.[115] In fact, "the broadcasting industry is entitled under the First Amendment to exercise 'the widest journalistic freedom consistent with its public [duties].'"[116] Restraint must be exercised in order to "guard[] against 'the risk of an enlargement of Government control over the content of broadcast discussion of public issues.'"[117] Thus, acceptance of the scarcity doctrine is merely an initial premise, and does not obviate the need to analyze proposed regulation in light of broadcasters' powerful First Amendment interests. Following the applicable principles – in cases accepting the continuing viability of *Red Lion* – the Supreme Court has overturned a statutory ban on editorializing by noncommercial broadcasters as an unjustifiable "abridgment of the important journalistic freedoms which the First Amendment jealously protects,"[118] and has

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115 *FCC v. League of Women Voters, supra,* 468 U.S. at 378.

116 *CBS v. FCC*, 453 U.S. 367, 395 (1981), *quoting Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 110 (1973).

117 *FCC v. League of Women Voters*, 468 U.S. at 379-80, *quoting Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 126.

118 *FCC v. League of Women Voters, supra.*

held that the public interest obligations under the Communications Act do not override broadcasters' journalistic right to refuse editorial advertisements.[119]

Under these same principles, the Supreme Court has never held that the regime of *Red Lion* can justify the imposition of quantitative programming requirements. To the contrary, the Court has consistently required that any programming obligations leave broadcasters wide discretion in fulfilling their public interest obligations. In upholding the constitutionality of particular aspects of the fairness doctrine in *Red Lion* itself, the Court held that the Commission could require a licensee that had chosen to present specific types of programming – personal attacks or political editorials – to "make available a reasonable amount of time to those who have a different view from that which has already been expressed on [the] station."[120] Significantly, the fairness doctrine generally left broadcasters wide discretion as to how and when they would fulfill their obligation to cover each side of public issues. And the particular provisions of the fairness doctrine respecting the political attacks and political editorials at issue in *Red Lion* imposed obligations on broadcasters only if, in the exercise of their discretion, they broadcast programming triggering those rules.[121] Thus, the regulations at issue in *Red Lion* were constitutional because they left licensees with broad discretion in their programming

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[119] *Columbia Broadcasting System, Inc. v. Democratic National Committee, supra.*

[120] 395 U.S. at 391.

[121] Of course, the constitutionality of coercing speech in response to a broadcaster's exercise of its own speech rights was subsequently called into question, and the fairness doctrine was abolished. *See Syracuse Peace Council, supra,* 2 FCC Rcd at 5048-52, ¶¶36-61.

decisions.[122] In fact, the Court in *Red Lion* emphasized that more intrusive regulation of broadcasters could be unconstitutional:

> We need not and do not now ratify every past and future decision by the FCC with regard to programming. There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to §326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues.[123]

The upholding of the fairness doctrine rules in *Red Lion* lends no support to the purported constitutionality of mandatory free time.[124]

Similarly, the other Supreme Court precedent permitting an enforced right of access involved no quantification of broadcasters' obligations. In upholding the right of access for

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122 As stated by the Report of the FCC's Children's Television Task Force, Vol 1., p. 94 (1979), the fairness doctrine affords licensees broad discretion in deciding "what public issues to cover, when to cover them and how to cover them."

123 395 U.S. at 396.

124 As one scholar has pointed out:

> With respect to the fairness doctrine, it is easy to forget how much discretion the broadcasters retained over the way in which, in what format, at what length, and with respect to what issues they were to fulfill their obligation. Theoretically at least, although fulfilling the obligation might affect their programming decisions somewhat, they retained sufficient control of their program content so that they could minimize their financial losses. With respect to the personal attack rules, while they did require that broadcaster give "free" access to the victims of personal attacks, broadcasters could avoid bringing the obligation into play simply by not engaging in personal attacks. In other words, both the fairness doctrine and the personal attack rules left the broadcaster with significant discretion about how to structure broadcast content. The free TV proposals, by contrast, appear to leave the broadcasters with virtually no discretion about how to fulfill the obligation and no means of escaping it.

Lillian R. BeVier, *Is Free TV Time for Federal Candidates Constitutional? supra,* at 13.

federal candidates imposed by §312(a)(7) of the Communications Act, the Supreme Court found the statute "defined a sufficiently *limited* right of reasonable access" that broadcasters' discretion was preserved.[125] *CBS v. FCC* is also distinguishable on a fundamental level from proposals for mandated free time because those seeking access under §312(a)(7) may be required to pay for it.[126]

Most recently, in *Turner Broadcasting System v. FCC*,[127] the Supreme Court gave further indication that quantitative programming requirements would not survive constitutional scrutiny. In *Turner*, the Court considered the argument that the Commission's must-carry rules were content-based because the rules' "preference for broadcast stations *automatically* entails content requirements."[128] The basis for this contention was that the Commission allegedly regulates the content of broadcast licensees' programming, but not cablecasters' programming, and that by

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[125] *See FCC v. League of Women Voters*, 468 U.S. 378-79, *quoting CBS v. FCC*, 453 U.S. at 396. The *CBS* Court specifically noted the Commission's statement that, in enforcing the statute, it would "'provide leeway to broadcasters and not merely attempt de novo to determine the reasonableness of their judgments....'" *Id.* at 396, *quoting In re Complaint of Carter-Mondale Committee*, 74 F.C.C. 2d 657, 672 at ¶44.

[126] Like the fairness rules upheld in *Red Lion*, the equal opportunities rules promulgated pursuant to §315 merely require a broadcaster who has allowed a qualified candidate to make an appearance on its air to make "equal opportunities" available to opposing candidates. The sale of time or the broadcasters' exercise of discretion to permit a use by the first candidate triggers the equal opportunities provision. This contrasts with the blanket and unavoidable obligation to donate time to political candidates called for in the various current proposals. We note that the Commission has never attempted to require a station to donate time to a candidate comparable to the time paid for by an opponent. *See, e.g., Paulsen v. FCC*, 491 F. 2d 887,889 (D.C. Cir. 1974), *citing* Letter to M. R. Oliver, 11 P&F Radio Reg. 239 (1952).

[127] 512 U.S. 622 (1994).

[128] Id. at 649 (internal quotes omitted).

forcing cablecasters to carry broadcast signals, the rules imposed content-regulated broadcast programming on cable companies.

The Court acknowledged that broadcast programming "is subject to certain limited content restraints imposed by statute and FCC regulation," giving as its example the Commission's authority under the Children's Television Act to consider the "extent to which [a] license renewal applicants has 'served the educational and informational needs of children.'"[129] But the Court rejected the contention that the must carry rules were content-based, explaining that this argument "exaggerates the extent to which the FCC is permitted to intrude into matters affecting the content of broadcast programming." Noting that the Commission "is barred by the First Amendment and [§326 of the Communications Act] from interfering with the free exercise of journalistic judgment," the Court concluded:

> In particular, the FCC's oversight responsibilities *do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations*; for although "the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear."[130]

The Court reiterated this point with respect to noncommercial educational stations, which it said "are subject to no more intrusive content regulation than their commercial counterparts":

> What is important for present purposes, however, is that noncommercial licensees are not required by statute or regulation to carry any specific quantity of "education" programming or any particular "educational" programs. Noncommercial licensees, like their commercial counterparts, need only adhere to the general requirement that their programming serve "the public interest, convenience or necessity."

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[129] Id. at 649 & n.7.

[130] Id. at 650 (quoting Network Programming Inquiry, Report and Statement of Policy, 25 Fed. Reg. 7293 (1960)) (emphasis added).

To conclude its explanation of why FCC and Congressional exercise of control over programming offered by broadcast stations was – and has to be – "minimal," the Court unequivocally stated:

> our cases have recognized that Government regulation over the content of broadcast programming must be narrow, and that broadcast licensees must retain abundant discretion over programming choices.[131]

The clear thrust of this discussion is that the Supreme Court would view mandatory free time for candidates as a violation of broadcasters' First Amendment rights, because it would totally override, during the commandeered time, the "abundant discretion over programming choices" that licensees "must retain." Such regulation would go far beyond the Commission's "limited" authority to consider the extent to which a licensee has served the public interest.[132]

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131 Ibid.

132 Lower court decisions support the view that quantified programming requirements are unconstitutional. In *National Association of Independent Television Producers and Distributors v. FCC*, 516 F.2d 526, 536, (2d Cir. 1975), the court reviewed the Commission's decision to exempt certain categories of network programming, including children's programming, from the prime time access rule. The court upheld the rules against constitutional challenge, noting that the Commission was "not ordering any program or even any type of program to be broadcast," 516 F. 2d at 536, 537; however, it cautioned that "mandatory programming rules by the Commission even in categories would raise serious First Amendment questions."

Similarly, the D.C. Circuit's decision in *National Black Media Coalition v. FCC*, 589 F. 2d 578 (D.C. Cir. 1978), strongly suggests that mandatory programming rules would be unconstitutional. There the court affirmed the Commission's decision not to adopt quantitative standards for use in comparative renewal proceedings, observing that this approach would "subvert the editorial independence of broadcasters and impose greater restrictions on broadcasting than any duties or guidelines presently imposed by the Commission." Id. at 581.

As discussed above in Section III, although a panel of the United States Court of Appeals for the District of Columbia upheld a statutory provision requiring licensees of DBS services to reserve between four and seven percent of their channel capacity for non-commercial programming of an educational and informational nature, *Time Warner Entertainment Co. L.P. v. FCC*, 93 F. 3d 957 (D.C. Cir. 1996), that position could not command a majority of the full Court, which denied rehearing *en banc* by only a five to five vote. 105 F. 3d 723.

A government imposed programming obligation – even one purportedly designed "to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern" – can be upheld only if the "restriction is narrowly tailored to further a substantial governmental interest."[133] Even if this lesser level of scrutiny applies,[134]:

> When the Government defends a regulation on speech as a means to redress past harms or present anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.[135]

While there is no specific proposal advocated now by the Commission, and no specific governmental interest being propounded, it is difficult to see how any proposal to require

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133 *FCC v. League of Women Voters*, 468 U.S. at 380.

134 There is a powerful argument to be made that forcing broadcasters to provide mandatory free time for political candidates to present their political views is a content-based regulation of speech to which the highest level of scrutiny should apply. As one commentator has said in discussing a scheme involving not only the requisitioning of time from broadcasters, but restrictions on candidates' use of that time:

> [W]hat might matter most is that the mandates are speaker-identity, subject-matter, and format-specific. True, the mandates do not single out particular viewpoints for more or less favorable treatment. Apart from the fact that they lack that inevitably fatal flaw, it is hard to imaging regulations that would be less content-neutral: looked at through the lens of what they require of candidates to become entitled to their benefits, they not only prescribe the generic class of qualified speakers (certain candidates for federal office) but also dictate the subject matter and the format of the speech.

BeVier, *Is Free TV for Federal Candidates Constitutional?*, *supra*, at 15. Since, as we discuss in the text, mandatory free time for candidates cannot survive intermediate scrutiny, *a fortiori*, it would not survive strict scrutiny. *See, e.g., Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 115-18 (1991).

135 *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. at 664.

broadcasters to give quantified amounts of air time to political candidates can pass muster, even under the more lenient standard of *Red Lion* and its progeny.

It is far from clear what governmental interest is advanced by forcing broadcasters, at their expense, to air candidates' political statements. The idea that without such coercion candidates have been and will continue to be unable to communicate their views to the American public is patently false. First, the Commission acknowledges that broadcasters have devoted many hours of program time to political coverage. In addition to pervasive news coverage, broadcasters have provided significant airtime in the form of debates, candidate forums and political convention coverage. Candidates also have access to the public through the purchase of air time at lowest unit rates during the periods prior to elections. Beyond television, there are numerous other ways in which candidates can and do communicate their positions to the public, including cable programming and the Internet, to name two extremely pervasive forms. In short, the notion that the American public will not know what political candidates stand for unless broadcasters are forced to give them free time is, at best, unproven, and at worse demonstrably false.

We will not attempt here to catalogue all the purported governmental interests that might be offered to prop up the call for mandatory free air time for candidates. Some, such as the desire to equalize the amount of exposure opposing candidates get, would be patently unconstitutional.[136] Others, such as reducing the amount of money spent in campaigns, and thereby decreasing the need for candidates to seek large campaign donations, are unlikely to be

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136 *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements in our society in order to enhance the relative voice of other is wholly foreign to the First Amendment.")

directly advanced – or advanced at all – by free time, since candidates would still have the incentives they have now to raise and spend as much money as they could on behalf of their candidacies, either for broadcast advertising or other purposes (e.g., direct mail). Moreover, the governmental interest in reducing the importance of campaign contributions in our politics, and the attendant perception of many people that political influence can be bought, could be accomplished by an alternative means much more direct and much less restrictive of First Amendment rights: public financing of election campaigns.

Other asserted governmental interests, such as the desire to reverse the supposedly declining quality of political discourse, are entirely subjective, ignore the history of rough and tumble political discourse in this country and fail to appreciate the fact that the First Amendment protects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials,"[137] even if those attacks take the form of negative advertisements. Still others, such as the desire to reduce barriers to entry for candidates, even if it were constitutional to do so by equalizing free television exposure,[138] are unlikely to be directly or indirectly advanced, since the air time proposed to be commandeered is close to the time of the election, long after a candidate would have had to enter the race.[139] This list does not purport to be exhaustive of the reasons that might

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137 *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

138 *See Buckley v. Valeo, supra.*

139 In addition, most of the free time proposals contemplate Commission waiver of equal opportunities requirements so that fringe candidates – those most likely to face barriers to entry –

be offered to justify mandatory free time. It is given, rather, to indicate that the present dissatisfaction of many with the current state of campaign finance does not, in and of itself, provide reason to force broadcasters to give free time to candidates. Given the likelihood that mandatory free time is unconstitutional under any arguably applicable standard of review, the Commission should be extremely hesitant to promulgate rules placing this burden on broadcasters, particularly in light of the repeated refusal of Congress to take this step.

2. Requiring Broadcasters to Give Quantified Free Time to Candidates Is a Taking in Violation of the Fifth Amendment

As succinctly put by Commissioner Furchtgott-Roth, the proposal to force broadcasters to provide free time to candidates "amounts to [] a painful and targeted tax on their industry in order to fund a general public benefit."[140] As such, this scheme would be a taking of private property for public use without just compensation, in violation of the Fifth Amendment to the Constitution. As the Supreme Court has said, "[T]he 'Fifth Amendment's guarantee ... [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[141]

If additional exposure to the views of political candidates – over and above that which exists now – is a public good that society believes is worth having, or if it is thought vital to reduce the role of money in our election campaigns, there is no valid reason why the price should

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would be excluded in any case.

[140] Separate Statement of Commissioner Harold Furchtgott-Roth at 3.

[141] *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123 (1978), *quoting Armstrong v. United States*, 364 U.S. 40,49 (1960).

be paid solely by one narrow segment of society, the broadcast industry. Clearly, there are alternatives to foisting the cost of this project on broadcasters. General taxpayer revenue can be used to finance campaigns or to give some assistance to candidates in purchasing time. Free time could also be provided on public broadcasting stations, again at the expense of all taxpayers.

The placement of the economic burden of free time on broadcasters cannot be justified by the mantra that the public owns the airwaves. As previously discussed, the spectrum exists only be virtue of electromagnetic radiation, produced by a radio transmitter, and cannot be utilized today without massive capital investment in facilities, programming and personnel. To appropriate significant amounts of time that could be sold to recoup this investment for the benefit of society as a whole is a taking subject to compensation.

Conclusion

For all of the foregoing reasons, the Commission should refrain from expanding the public interest obligations of digital broadcasters beyond those now applicable to analog broadcasters.

Respectfully submitted,

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